

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Re:	12-22199 (RDD)
RONALD J. DECONNE and KARIN B. DECONNE,	White Plains, NY
	May 30, 2014
Debtors.	

DECONNE, et al.,	13-08213
Plaintiffs,	
v.	
MARX,	
Defendant.	

TRANSCRIPT OF HEARING ON (#1-3) THIRD-PARTY COMPLAINT,
(#19) MOTION TO DISMISS THIRD-PARTY COMPLAINT OF THIRD-PARTY
PLAINTIFF, (#25) AMENDED MOTION TO DISMISS THIRD-PARTY
COMPLAINT, (#30) AMENDED MOTION FOR SUMMARY JUDGMENT
AND (#29-30) STATEMENT AND OPPOSITION
BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Plaintiffs: LINDA M. TIRELLI, ESQ.
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1 THE COURT: Okay. Good morning.

2 This is In Re: DeConne v. Marx and Marx v. Bank of
3 New York, et al.

4 So I don't know if you've discussed any particular
5 order here. The main matter, I think, is I haven't seen any
6 opposition to the third party defendant's motion to dismiss,
7 it's the summary judgment motion that Mr. Marx has made but
8 maybe that suggests we should go ahead with the motions to
9 dismiss first which I didn't see any opposition to.

10 MR. MCCAFFREY: Correct, Your Honor, there isn't.

11 THE COURT: There's no opposition to those?

12 Could you just state your name for the record?

13 MR. MCCAFFREY: I'm Brian McCaffrey. I represent
14 the Craig Marx, who is the creditor, third party plaintiff.

15 There is no opposition to the motions to dismiss
16 with the banks and I'm the movant today for the summary
17 judgment motion.

18 THE COURT: All right. So why don't I deal with
19 the banks' motions to dismiss which are by Bank of New York and
20 JP Morgan Chase.

21 Are you two here for them?

22 MR. SCHLEIFSTEIN: I'm Dan Schleifstein here from
23 Parker, Ibrahim & Berg for JP Morgan Chase.

24 THE COURT: Okay.

25 MR. MCGEOUGH: Paul McGeough from Fidelity National

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1 Law Group for third party defendant Fidelity National Title
2 Insurance Company.

3 THE COURT: Right.

4 MR. MCGEOUGH: We joined in the motions of our co-
5 defendants United Land. Mr. McCabe submitted a motion but he's
6 not here yet.

7 THE COURT: Okay. Well, the motions are unopposed
8 and I've reviewed them and there's a reason why they're
9 unopposed, they would be granted, so I will -- I'll grant them.

10 So Mr. McCabe won without being here but he won on
11 his papers.

12 So I think each of you should probably e-mail to
13 chambers a separate order granting your respective motions.

14 MR. MCGEOUGH: We can do that.

15 THE COURT: So you're free to leave if you want or
16 you can stay here if you want to see how this turns out.

17 MR. SCHLEIFSTEIN: Respectfully, we'll stay. Thank
18 you.

19 THE COURT: Okay. All right. So why don't we turn
20 then to Mr. Marx' summary judgment motion.

21 MR. MCCAFFREY: Brian McCaffrey, again appearing
22 for creditor Craig Marx.

23 We're the movant this morning before the Court for
24 the summary judgment motion against the adversary complaint of
25 the debtors Ronald and Karin DeConne, represented by Ms. Linda

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1 Tirelli.

2 In short, Your Honor, I'll just give a little bit
3 of a background to color it in. I'm sure Your Honor is aware
4 of it and read the papers and then I'll just go into a little
5 bit of a legal argument if I may and I'll just try to keep it
6 brief.

7 Mr. Marx bought what I define in my papers as the
8 "mortgage insurance." There are two mortgages that Ronald and
9 Karin DeConne took, both from the Bank of New York Mellon.

10 THE COURT: Can I interrupt you?

11 You say Mr. Marx bought these. The documents -- I
12 just want to make sure I understand what the current state of
13 play is on the proofs of claim.

14 The documents show a fifty percent interest for Mr.
15 Marx, himself, and a fifty percent interest for a related
16 entity.

17 MR. MCCAFFREY: Equity Trust.

18 THE COURT: Right. So what is the claim at this
19 point? Is it for half?

20 MR. MCCAFFREY: No, it's for whole, Your Honor.

21 Mr. Craig Marx is here this morning, Your Honor,
22 and the Equity Trust was a savings account, a form of an IRA
23 that he put his money into and was free to take it in or out so
24 when he made the purchase, the assignment to him as it's worded
25 is admittedly a bit convoluted -- I wish it was clearer but I

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1 wasn't the attorney drafting the papers at the time -- in
2 essence it's all Craig Marx. There's no other entity --

3 THE COURT: Well, have you amended the proof of
4 claim? Is the proof of claim just for Mr. Marx?

5 MR. MCCAFFREY: Currently, it is. I don't mean to
6 mislead or misspeak but I believe, yes, it's solely for Craig
7 Marx as the claimant.

8 THE COURT: Okay. So what would be the basis for
9 his interest in the fifty percent that was bought by the trust?

10 MR. MCCAFFREY: That the equity -- the annuity
11 trust account is entirely his. There's no other person,
12 individual, entity that can make a claim to that --

13 THE COURT: Well, the trust can't; right? It's the
14 -- the trust really owns it, I guess, unless there's some sort
15 of --

16 MR. MCCAFFREY: There are no other beneficiaries or
17 depositories or funders of the trust.

18 THE COURT: In any event, the claim has not been
19 amended to assert that it's on behalf of both him in respect of
20 fifty percent ownership of the notes and mortgage and the trust
21 and that's how you -- I'm not suggesting that you are precluded
22 from amending it but at this point that's where we're at;
23 there's a proof of claim on file by Mr. Marx for himself,
24 individually, for the full amount of the note.

25 MR. MCCAFFREY: Correct, Your Honor. I think

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1 that's the last thing.

2 THE COURT: Okay.

3 MR. MCCAFFREY: The claims were amended several
4 times and, again, in my papers I did that when I first filed
5 the claim -- I brought this action in state court, Your Honor,
6 I didn't know that I would be here in federal court litigating.

7 THE COURT: Right.

8 MR. MCCAFFREY: I've appeared before Your Honor
9 before. Usually and almost exclusively it's on behalf of
10 homeowners not as creditor to the bank but in this case I am.

11 Mr. Marx came to me, he had bought the papers, I
12 reviewed them, looked to foreclose, I brought it in the
13 Westchester County state court and we're here.

14 My claim -- Ms. Tirelli --

15 THE COURT: But the trust wasn't a plaintiff in the
16 state court.

17 MR. MCCAFFREY: I have to check the caption but,
18 no, I don't believe so. No.

19 Again, I tried the best I could in my papers in the
20 summary judgment motion to clarify that but, plain speaking,
21 there's no distinction between -- well, legal distinctions --

22 THE COURT: Legal distinctions.

23 MR. MCCAFFREY: Yes, legal distinctions, but in
24 essence underlying -- again, no one else claims holds or any
25 money that was in that account or any other parties can claim

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1 to it or to forbid Mr. Marx from having withdrawn it or so on
2 and so forth. There's no battle there.

3 THE COURT: Well, am I right about that? Is there
4 a battle there?

5 MS. TIRELLI: Well, Your Honor -- good morning.

6 Linda Tirelli on behalf of the DeConne's.

7 Just very briefly, I believe this presents a
8 question of fact for the Court and that defeats summary
9 judgment. I did bring that out in my papers.

10 I don't know what this trust can or cannot do. I
11 don't know the parameters of the trust. As I pointed out in my
12 papers I did ask Mr. Marx about that at deposition. He did not
13 have the answers. He was not able to answer this. So there is
14 no witness testifying to what Mr. McCaffrey is telling the
15 Court today. I've not seen any documentation on it other than
16 I did have one communication with -- well, maybe two or three
17 communications directly with Equity Trust where I was told Mr.
18 McCaffrey is not their attorney, he does not represent them and
19 he is not to -- you know, they were shocked [sic].

20 THE COURT: Well, who would you speak with?

21 MS. TIRELLI: Well, when I researched the company
22 on line -- apparently they have something of an on line
23 presence -- and there is a president of the company. It's
24 owned by an individual family as I understand it and when I
25 brought this to Mr. McCaffrey's attention it was at that point

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1 that he did amend to remove them from the caption as I recall.

2 MR. MCCAFFREY: I've never heard anything from the
3 Trust and I was not aware that Ms. Tirelli contacted the Trust.
4 I know nothing about that.

5 THE COURT: Well, I'm sorry, I thought that --
6 let's make sure we're talking about the same Trust.

7 We're talking about the Equity Trust Company that
8 holds fifty percent under the assignment from LMG for the
9 benefit of the Craig Marx individual IRA?

10 MR. MCCAFFREY: That's right, Your Honor. There's
11 only one.

12 THE COURT: Okay. Well, there are a couple of
13 issues here; one, I guess, is the right further to amend the
14 proof of claim to add the equity trust for the benefit of the
15 Craig Marx IRA. That's really not at issue in today's matter
16 but I think that the record should be clear that at least based
17 on the documents you're relying on in part Mr. Marx really
18 doesn't own the whole note 100 percent. He may be able to act
19 as the agent for the other fifty percent and he may be able to
20 cause an amendment of the proof of claim for that other fifty
21 percent, although amending a proof of claim in a Chapter 13
22 case is a little more difficult than amending it in other cases
23 because of the time limits that are strict in Chapter 13 cases.

24 I guess the other issue is it has been made a live
25 issue by Ms. Tirelli in connection with this motion which is --

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1 I guess as you put it but correct me if I'm wrong -- you
2 contend that there's a fact issue as to whether the assignment
3 really was -- whether Mr. Marx can speak for the fifty percent
4 interest covered by the assignment that went to the Equity
5 Trust on behalf of his IRA.

6 MS. TIRELLI: Yes, Your Honor, and again, based on
7 preliminary investigations that I did into what is this Equity
8 Trust Company, they do not authorize any outside attorneys
9 outside of the ones that, I guess, they use. I think they're
10 based in Ohio if I'm not mistaken or possibly Illinois.

11 They don't authorize any attorneys or anyone to
12 represent them or put their names into litigation.

13 THE COURT: Am I right that it's only a fact issue
14 as to fifty percent. The other fifty percent is the assignment
15 is to him; right? So we're not -- it's only a fact issue as to
16 half.

17 MS. TIRELLI: Well, Your Honor, it's a fact issue
18 as to half but there's also a fact issue as to what was
19 assigned or what could be assigned.

20 THE COURT: Well, okay, we could get to that but I
21 think there we'd be focusing on --

22 MS. TIRELLI: At best, fifty percent.

23 THE COURT: Mr. Marx' fifty percent.

24 MS. TIRELLI: Yes.

25 THE COURT: Okay.

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1 MS. TIRELLI: At best fifty percent.

2 THE COURT: All right. Sorry, I interrupted you.

3 MR. MCCAFFREY: Thank you, Your Honor.

4 I mean I can proceed as I understand it that, fine,
5 there is \$800,000.00 worth of mortgages and more outstanding as
6 of today so if Mr. Marx were only potentially here he'd be
7 precluded from going on behalf -- we'd make that fine
8 distinction, then I would argue for the other -- for half --
9 the other \$400,000.00.

10 THE COURT: For the half without prejudice to the
11 right to amend the proof of claim or to prove up the rest of
12 the other half in a later action. Okay.

13 MR. MCCAFFREY: So, again, just trying to -- from A
14 to B and some continuity, we deposed Mr. and Mrs. DeConne.
15 They admit having --

16 MS. TIRELLI: Wait. Objection, Your Honor.

17 Mrs. DeConne was never deposed. I just wanted to
18 make that clear on the record.

19 THE COURT: Okay.

20 MR. MCCAFFREY: Questions were not asked of Mrs.
21 DeConne. Mr. Ronald DeConne, the husband, was deposed.

22 THE COURT: Right.

23 MR. MCCAFFREY: He was shown the mortgages, the
24 notes, the summary of the accounts and he acknowledged them and
25 said, yes, I borrowed the money -- \$400,000.00 in 2004, I

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1 borrowed \$430,000.00 in 2006, I used most of the second loan to
2 pay off the first, so on and so forth. He acknowledges the
3 outstanding balances --

4 THE COURT: Well, he didn't really acknowledge the
5 outstanding balances. He acknowledged that there was an amount
6 owing in a certain range but he didn't say, I acknowledge it's
7 exactly, you know, \$432,000.75, he said it's in the range of
8 around \$375,000.00, I think.

9 MR. MCCAFFREY: That's astutely correct, Your
10 Honor.

11 THE COURT: Okay.

12 MR. MCCAFFREY: I don't mean to, again, mislead.
13 I'm trying to speak in a general --

14 THE COURT: Well, if it's an important point. I
15 mean if you're looking for summary judgment on an exact dollar
16 figure I don't think you can get it [sic] but if you're making
17 the point that he acknowledged that he owes money to somebody
18 and, clearly, if Bank of New York were the claimant, he's
19 acknowledged, I think he would owe money to Bank of New York
20 under the note and mortgage.

21 That's right; right? There's no dispute about
22 that.

23 MS. TIRELLI: Yes, Your Honor, there's no dispute
24 that my clients borrowed money from the Bank of New York which
25 still exists today. That was the point that I was bringing out

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1 in my papers.

2 THE COURT: Okay.

3 MS. TIRELLI: They do acknowledge owing something,
4 they don't know how much.

5 THE COURT: They don't know the exact amount.

6 MS. TIRELLI: They don't know the exact amount.

7 THE COURT: Although, they have an order of
8 magnitude --

9 MS. TIRELLI: Right, or when --

10 MR. MCCAFFREY: The lion's share is outstanding.

11 THE COURT: Right.

12 MS. TIRELLI: Or when it was due, or how it was due
13 or demanded, etc.

14 THE COURT: Okay. But I mean in a bankruptcy case
15 it's all --

16 MS. TIRELLI: Fair enough.

17 THE COURT: Okay.

18 MR. MCCAFFREY: And those -- the two notes and the
19 mortgages were then transferred to Chase. I have -- it's been
20 difficult -- are you going to object or am I going to --

21 THE COURT: No, he's just making his argument so
22 you don't need to keep standing up.

23 MS. TIRELLI: All right. I'll hold my objections.

24 MR. MCCAFFREY: I mean I didn't come -- am I
25 correct, Your Honor, in that the parameters are to explain my

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1 points as best I can on the papers --

2 THE COURT: Sure. Right.

3 MR. MCCAFFREY: -- rather than via trial,
4 otherwise, you know, I'd be prepared differently.

5 That they were transferred, assigned from the Bank
6 of New York Mellon to Chase that a merger if you will happened -
7 -

8 THE COURT: Well, can we stop on that because I
9 think you offer up two different --

10 MR. MCCAFFREY: Theories?

11 THE COURT: -- theories and sources of evidence for
12 the transfer to Chase.

13 Theory 1 is what you were just getting to which is
14 a so-called merger; a portion of the Bank of New York with
15 Chase and I guess the issue I have there is that the basis for
16 that -- the evidence for the fact that as to these notes Chase
17 was the transferee by merger -- is an SEC statement and a press
18 release; right?

19 MR. MCCAFFREY: And a letter from the comptroller's
20 office overseeing the banking institution that approved the
21 purchase of Chase of certain assets of the Bank of New York --

22 THE COURT: Right.

23 MR. MCCAFFREY: -- and then New York business
24 corporation law stating that such a transfer -- and it's
25 defined under their auspices as a merger --

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1 THE COURT: But it's not -- okay -- but there's a
2 difference between a merger and a purchase of assets. Business
3 corporation law refers to a merger. The documents, to the
4 extent they would be admissible evidence, refer to a purchase
5 of certain assets.

6 There's a table of contents of a purchase agreement
7 but am I right that the record doesn't show an agreement
8 pursuant to which these particular assets -- these notes -- and
9 the related mortgage were transferred?

10 MR. MCCAFFREY: Correct, Your Honor.

11 THE COURT: Okay.

12 MR. MCCAFFREY: I don't have a schedule as part of
13 my bringing in other opponents and I've sought it from them and
14 have come up inconclusive. The best I have is an affidavit of
15 Belle Schuele [Ph.] --

16 THE COURT: Well, we'll get to that because that's
17 the second piece of evidence but it seems to me just on the so-
18 called merger theory the evidence, itself, shows it wasn't a
19 merger, it wasn't a stock merger or a complete acquisition. It
20 was an acquisition of certain assets that could be
21 characterized as comprising Bank of New York's retail business.

22 So I think without evidence of the actual transfer
23 of the assets which could be in the form of an agreement or
24 some filing that would show the specific assets that were
25 transferred. I don't think you have enough evidence to show

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1 that there was a transfer of these particular notes in the
2 mortgage from Bank of New York to Chase.

3 It says assets but who knows what those assets are?
4 I don't know what -- there's no document that says that among
5 the assets transferred was --

6 MR. MCCAFFREY: No.

7 THE COURT: Okay.

8 MR. MCCAFFREY: I lacked that. I do have account
9 statement summaries showing these two loans, the two loan
10 numbers ending with the same numbers --

11 THE COURT: Well, that Chase started billing.

12 MR. MCCAFFREY: -- that Chase took them over. I do
13 have my affidavits.

14 THE COURT: Well, can we turn the affidavits --
15 because that's kind of really the other theory because she
16 doesn't talk about a merger, she says that -- this is Ms.
17 Schuele --

18 MR. MCCAFFREY: That's Exhibit C.

19 THE COURT: Exhibit C; right?

20 MR. MCCAFFREY: Yes. Exhibit C.

21 THE COURT: So this is S-C-H-U-E-L-E, Belle, B-E-L-
22 L-E, Schuele.

23 So she says that -- well, first of all, she says
24 the two mortgages. It's really one mortgage; right? And two
25 notes?

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1 MR. MCCAFFREY: No, two mortgages and two notes,
2 Your Honor. One was an equity line of credit but there's a
3 fine distinction between those -- four documents altogether;
4 two notes, two mortgages.

5 THE COURT: Okay. All right.

6 So she says that they were sold to JP Morgan Chase,
7 you know, it wasn't just a transfer by merger, but this isn't
8 really admissible evidence is it?

9 MR. MCCAFFREY: I believe under summary judgment it
10 is, Your Honor, maybe perhaps not at trial. It's a self-
11 evidencing document. The statement --

12 THE COURT: It doesn't -- first of all, she says
13 that she's a vice president of the Bank of New York Mellon so if
14 in fact the notes were sold to Chase how could she reference
15 Chase's systems at all?

16 MR. MCCAFFREY: She referenced her own system to
17 show that there was a transfer, a purchase.

18 THE COURT: All right. But then she doesn't --

19 MR. MCCAFFREY: There's evidence of screen shots
20 that show how the DeConne's loan --

21 THE COURT: There isn't actually. She doesn't say
22 what the source of this information is. I mean if you look at
23 the Dean case --

24 MR. MCCAFFREY: I did.

25 THE COURT: I mean I think this is right on point

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1 on that. I mean there was a similar affidavit there, although
2 frankly, I think it was more detailed than Ms. Schuele's and
3 it's just not -- you know, it was not admissible.

4 MR. MCCAFFREY: Well, Your Honor, I don't mean to
5 jump around but if I had a jury -- if I fail in my summary
6 judgment the burden is with the plaintiff to go beyond
7 speculation as to who owns the note --

8 THE COURT: You have to introduce sufficient
9 evidence on your prima facie case first for summary judgment so
10 I guess I come back to how is this sufficient evidence if it's
11 not admissible?

12 MR. MCCAFFREY: Well, what I have, Your Honor --
13 and I've asked Your Honor to look and I would implore Your
14 Honor to look if you would to original notes and mortgages --

15 THE COURT: No, that's a separate thing. We're
16 talking about the transfer to Chase.

17 MR. MCCAFFREY: I understand, Your Honor.

18 THE COURT: We'll get to whether there's a disputed
19 issue as to whether Mr. Marx is currently in possession of the
20 original note and mortgage. That's fine. But under the case
21 law -- the statute -- to the extent it's covered by the UCC,
22 Article III --

23 MR. MCCAFFREY: I think it's sufficient --

24 THE COURT: Since the note is not -- since he's not
25 a holder, since it's not endorsed to him or endorsed in blank,

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1 what he got from LMG is only what LMG had so you have to go
2 back to the chain of title. If LMG's transferor, Chase, didn't
3 really have the authority to transfer title, then LMG didn't,
4 then Mr. Marx doesn't.

5 So it doesn't really have anything to do with the
6 fact that Mr. Marx is currently in possession of the original
7 note and mortgage. It goes to whether the undisputed original
8 holder and issuer, Bank of New York, actually validly
9 transferred to Chase and I don't think that Ms. Schuele's
10 affidavit is admissible evidence as to that. You may be able
11 to supplement that with her testimony as to, you know, whether
12 she's the record custodian or how the records are kept and what
13 the source is and whether the screen shots are reliable,
14 whether they could be manipulated, you know, all of those
15 things but her affidavit doesn't cover any that.

16 MR. MCCAFFREY: Okay. But in the totality of the
17 circumstances where Bank of New York has been brought in and
18 Chase has been brought in, none of them contest anything that
19 I've said in my papers. No one says, no, we didn't transfer it
20 or it's not ours --

21 THE COURT: Well, you're not moving as to them.
22 They succeeded in dismissing your complaint as to them.

23 MR. MCCAFFREY: But may I, Your Honor?

24 Isn't it a totality of service -- it's the case law
25 and the applicable statute --

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1 THE COURT: But what's the other evidence?

2 MR. MCCAFFREY: -- it shows intent of the parties
3 to transfer.

4 THE COURT: What's the other evidence of a transfer
5 from Bank of --

6 MR. MCCAFFREY: [Inaudible] that go --

7 THE COURT: No, from Bank of New York to Chase.

8 MR. MCCAFFREY: Well, I'd be rehashing what we
9 went over, Your Honor. The evidence is my summaries of the
10 accounts, the apparent documented transfer of assets
11 acknowledging that the loans ending in 9856 and, I think, 9007
12 don't exist although I'm sure they exist somewhere, I'm not in
13 possession of them, although I've attempted to get them and
14 it's a Herculean feat to do so and I have not been successful
15 at obtaining such documentation and I know we need to rely on -
16 -

17 THE COURT: I don't know why not. They're bank
18 records, why wouldn't they have -- I mean this was a
19 transaction that was approved by the controller of the
20 currency. I mean I don't know why they wouldn't have those
21 records.

22 MR. MCCAFFREY: Well, many calls, many letters,
23 many e-mails, many attempts were made and everyone -- I get
24 nothing.

25 THE COURT: Well, what about a 2004 exam?

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1 MR. MCCAFFREY: Well, I have a motion to dismiss in
2 which I can no longer proceed with discovery --

3 THE COURT: But before the commencement of your
4 claim against Chase you didn't do a 2004 exam?

5 MR. MCCAFFREY: No.

6 THE COURT: All right.

7 MR. MCCAFFREY: I know we need to proceed in
8 specifics under --

9 THE COURT: Look, this doesn't mean you can't put
10 on a case at trial. The only issue is whether you can do it as
11 a summary judgment.

12 MR. MCCAFFREY: Yes, I came in thinking that was my
13 fallback, Your Honor, this morning.

14 THE COURT: Okay. All right.

15 MR. MCCAFFREY: I'm trying to put my best foot
16 forward here this morning and there are -- if that is the only
17 -- and if it exists, the issue of fact that needs to be
18 determined --

19 THE COURT: I mean, look, I just want to go back to
20 her affidavit. She says -- first of all, she says she's a vice
21 president of Bank of New York.

22 MR. MCCAFFREY: It's a title that many people have
23 --

24 THE COURT: There are a lot Of vice presidents in
25 banks. We all know that.

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1 MR. MCCAFFREY: Many VPs everywhere.

2 THE COURT: So we don't know what her particular
3 source of knowledge is or expertise is with respect to the
4 things that she's testifying in her affidavit and then she gets
5 right into it saying, you know, she got an e-mail from -- well,
6 it doesn't say from whom but it's from you because you've
7 attached the e-mail -- whether these mortgages were ever sold
8 and then she says, "I reviewed several systems." It doesn't
9 say where or how they were kept, you know, anything about that
10 and then she says that the systems -- well, it doesn't even say
11 it but she says, "My review disclosed they were sold to Chase."
12 Then she has this line in here in Paragraph 4 which is,
13 "However, Chase did not convert the account containing this
14 mortgage to their systems until March 22, 2007."

15 You know, she's a VP of Bank of New York Melon. I
16 don't know how she knows that, you know, whether she called
17 someone up at Chase so that would be like double hearsay or
18 whether she -- somehow they have a shared system.

19 I mean basically every paragraph of this affidavit
20 highlights why it would not be admissible, that she would need
21 to supplement it with the proper foundation premised upon the
22 business record exception and hearsay rule or her own personal
23 knowledge or both and perhaps have to testify too. I mean it's
24 not a reliable -- I mean leave aside that the hearsay rule is a
25 codification of -- or is there because of the unreliability of

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1 certain types of testimony just on its face that shows why
2 because we don't know where this comes from or what it's based
3 on and it doesn't hit the points you need to establish an
4 exception to the hearsay rule which would probably be business
5 records, although maybe there's another exception.

6 MR. MCCAFFREY: With the hearsay rule, Your Honor,
7 we're also looking to what a party's motivation in telling a
8 lie would be; right?

9 THE COURT: Well, they've been sued and you're --

10 MR. MCCAFFREY: Ms. Schuele doesn't care about the
11 outcome of this case one way or the other.

12 THE COURT: They were sued in your complaint so she
13 has a motivation obviously to say it was done properly but I
14 just --

15 MR. MCCAFFREY: May I go to another point, Your
16 Honor, quickly?

17 THE COURT: So I guess the other point you're
18 relying on is the fact that Chase --

19 MR. MCCAFFREY: I don't use the word "merger." I
20 think the comptroller's letter uses the word "merger." I saw
21 it as -- not that I didn't know this kind of stuff --

22 THE COURT: But it's not a statutory merger. It's
23 not a --

24 MR. MCCAFFREY: But the banking department
25 describes it --

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1 THE COURT: Because as a businessman --

2 MR. MCCAFFREY: -- apparently a large enough
3 purchase -- I don't mean to cut Your Honor off but a large
4 enough purchase of the assets. They determined that its' a
5 merger.

6 THE COURT: Right, but --

7 MR. MCCAFFREY: So if it's a merger, then the
8 business case law says that everything under that without
9 further act or deed it's yours. I don't need an assignment.

10 THE COURT: But just by its terms it's not a merger
11 for purposes of the business corporation law. It's not a
12 statutory merger, it's a merger where obviously the bank
13 regulators are looking at it because there's a significant
14 transfer of banking business -- a consolidation of banking
15 business with the bank but it's clearly -- even just based on
16 Ms. Schuele's affidavit, Bank of New York still survives. It's
17 now called Bank of New York Mellon but it didn't transfer all of
18 its assets or the equity in it to Chase. It transferred a
19 chunk of its business which was the retail business but --
20 according to the press release and public filing but I can't
21 tell whether the particular asset was transferred as part of
22 that. It should be relatively easy to determine that and
23 there's an asset purchase agreement because you attach, you
24 know, the title page of that and the table of contents but I
25 would think that you could do that relatively easily but it's

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1 not here. The actual assets that were transferred are not
2 here.

3 So I don't think there is admissible evidence
4 sufficient to get to -- to then put the onus on the plaintiff
5 here to introduce evidence that there's a factual dispute.

6 Now, there is some evidence there, too, because of
7 the dates. The date in the assignment by Chase and the date in
8 the assignment by LMG, those dates are different. So there is
9 a little bit of evidence to suggest that there's some sort of
10 mix up and there's this lost note affidavit notion but I don't
11 think that given the lack of prima facie case that they need to
12 go further, that you just need to point out the lack of the
13 prima facie case. Again, simply on the summary judgment cases.

14 I want to make sure we've covered all of the issues
15 for trial. I think that is an issue, i.e., is there sufficient
16 evidence of a transfer of the notes and mortgages from Bank of
17 New York to Chase? Then, there's obviously a second transfer
18 which is from Chase to LMG because Mr. Marx got his interest
19 from LMG.

20 So I am a little confused as to the extent of the
21 dispute if there is one with regard to the transfer from Chase
22 to LMG. Here, I think, you have evidence of a transfer, you
23 have the assignments and I thin that puts the onus on the
24 plaintiffs to come up with evidence that cast the assignments
25 in doubt and what is that evidence?

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1 MS. TIRELLI: Well, Your Honor, the assignments
2 themselves reference notes from the year 3006 [sic]. They also
3 reference the entity as being JP Morgan Chase, N.A. There is
4 no such entity that I've been able to find as JP Morgan Chase,
5 N.A.

6 I've also not been able to establish that Ms.
7 Sullivan [sic] even works or has ever worked for Chase and I
8 have been in touch with Mr. Lempkin [Ph.], I've asked him
9 several times in the past eight months to just try to verify
10 whether or not she's ever worked there and to date he's not
11 been able to verify that she's ever worked there.

12 So that's something that I would certainly work on
13 prior to trial to try to locate if there really is a Laurie
14 Sullivan or not but there certainly is no such entity; you
15 can't have an assignment from a non-existent entity to Linear.
16 There is just simply no JP Morgan Chase, N.A. and to say what
17 are you transferring, well, you're transferring notes dated
18 3006 [sic].

19 THE COURT: Why? Because it should be JP Morgan
20 Chase Bank, N.A.?

21 MS. TIRELLI: Your Honor, I'm not going to
22 speculate. There are numerous Chase entities, probably more
23 than a dozen I'm venturing to guess but I'm not going to say
24 which one or what.

25 THE COURT: What's the basis to believe that Ms.

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1 Sullivan doesn't work for Chase?

2 MS. TIRELLI: Because of the sloppiness of the
3 documents, Your Honor. Purely because of the sloppiness.
4 She's naming an entity that doesn't exist.

5 Now, I have argued against Chase many times about
6 sloppy documents but at the very least a vice president of JP
7 Morgan Chase Bank, N.A., for example, would get the name of her
8 employer right. Referencing notes consistently -- both notes --
9 -- referencing notes from the year 3006. How does that get past
10 a true vice president or whatever she says she was, an officer
11 of an actual Chase entity. It just doesn't make any sense.

12 Furthermore, with regard to the affidavits of lost
13 note, why is somebody who actually works at Chase lying on an
14 affidavit saying the note is lost if supposedly Mr. Marx
15 actually has it.

16 So these documents are all highly suspect.

17 THE COURT: Well, how would that affect the
18 assignment because the assignment could be -- the assignment
19 doesn't say, we've handed over the note; right? The assignment
20 could be effective even if the note had been lost.

21 MS. TIRELLI: Well, I think this calls -- into the
22 totality [sic] of the circumstances, Your Honor, it calls into
23 credibility of whoever this Laurie Solomon is because she's the
24 one signing everything. It's the same person --

25 THE COURT: Well, again, why -- I think you have to

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1 do more than simply say, I don't know if she works at Chase or
2 not. So what more have you done to determine whether she
3 worked at Chase at the time?

4 MS. TIRELLI: Well, at this point, Your Honor, I
5 have -- and I can certainly bring it into evidence at trial
6 that JP Morgan Chase --

7 THE COURT: Well, have you sought discovery on that
8 issue?

9 MS. TIRELLI: Well, no, because it was cut short by
10 summary judgment. I did speak preliminarily to Mr. Lempkin on
11 several occasions --

12 THE COURT: Well, could you remind me what --

13 MS. TIRELLI: It was not formal discovery, Your
14 Honor, it was informal discovery, we were doing investigations
15 --

16 THE COURT: So there was no pre-trial order with
17 the discovery cutoff date here?

18 MR. MCCAFFREY: We had one, Your Honor. That's
19 when I asked for a time to make a motion for summary judgment.
20 We were ready for trial. Discovery was over.

21 MS. TIRELLI: Okay. Well, if discovery is
22 incomplete, then what we still have here, Your Honor, is an
23 assignment to a non-existent entity, all right, and that's a
24 question of fact that's appropriate for trial. There simply is
25 no such entity.

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1 To the extent that we're going to have new
2 affidavits coming in, I mean I'm sure I will do my best to get
3 an affidavit from somebody or at least some sort of public
4 record that Your Honor can take judicial notice of that there
5 simply is no record of there ever being a JP Morgan Chase, N.A.

6 You know, Mr. Lempkin has not been able to verify
7 that this person has worked there. I don't know that I can
8 disprove that she's worked there but I think that the burden,
9 you know, is again on Mr. Marx because these documents are
10 highly suspect. It's the dates, it's the names of the entities
11 and it's this person signing a false affidavit saying something
12 is missing when, perhaps, it's not.

13 THE COURT: But that wasn't here, that was someone
14 else.

15 MS. TIRELLI: No, I believe this is all signed by
16 Laurie Sullivan.

17 THE COURT: She signed the missing note affidavit?

18 MR. MCCAFFREY: I can't recall, Your Honor.

19 MS. TIRELLI: Your Honor, I believe that she signed
20 it.

21 THE COURT: Is that in the record? It wasn't
22 attached to the motion. Do you know what -- is it an exhibit?
23 Is it one of your exhibits?

24 MS. TIRELLI: The affidavit of lost note was
25 attached to the first six proofs of claim.

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1 THE COURT: Okay.

2 MS. TIRELLI: As I recall, they were all signed by
3 Laurie Sullivan.

4 THE COURT: Okay.

5 MS. TIRELLI: So that goes into her credibility;
6 who is this person and why did she sign? I do know that Mr.
7 Marx used to work for an entity at Chase.

8 THE COURT: I guess you also have a date issue.

9 MS. TIRELLI: You can't assign a note that was made
10 in 3006.

11 THE COURT: No, no, it's a different date issue
12 which is that the assignment by LMG to Mr. Marx predates the
13 assignment --

14 MS. TIRELLI: Predates --

15 THE COURT: -- according to the Sullivan signed
16 documents by Chase to LMG.

17 MS. TIRELLI: That, too, Your Honor. That, too,
18 Your Honor.

19 Your Honor, and interestingly enough the date of
20 the assignment from the alleged Chase entity also predates the
21 affidavit of lost note so how is it that you assign an asset
22 and then go back days later and say, oops, we don't have this,
23 here's an affidavit of lost note?

24 THE COURT: Well, that's conceivable to me. I
25 guess I don't really have a problem with that.

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1 MS. TIRELLI: Except that the only party that can
2 use an affidavit of lost note --

3 THE COURT: Under the New York law you can assign a
4 note without transferring the hard note.

5 MS. TIRELLI: True. But then if the note doesn't
6 exist the only party that can bring forth an affidavit of lost
7 note is the party that lost it. So that would be Chase and
8 Chase, as my client testified -- and I believe that his
9 testimony was attached as Exhibit N to BCF document No. 28 on
10 the adversary proceeding -- the very, very last page as my
11 client testified that Chase never tried to collect money. So
12 as far as my client knows I don't think that he's aware of how
13 or when Chase ever became involved or if they were ever
14 actually involved and this Chase entity that is brought forth
15 in the complaint simply doesn't exist.

16 So I think that whether or not there was ever a
17 transfer to Chase is at issue, whether or not a non-existing
18 entity at Chase could transfer anything to Linear is also at
19 issue.

20 THE COURT: Any response to that?

21 MR. MCCAFFREY: Well, overall, the transfer -- Mr.
22 Marx is taken through and not from. I know we're cutting off
23 potentially at how it went from BONY to Chase but as far as --
24 I come to the big picture; he's in possession of it, there's no
25 alternate theory as to how he got it and --

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1 THE COURT: No, I'm just focusing on whether I
2 should rule that there's a --

3 MR. MCCAFFREY: Issue.

4 THE COURT: -- there are live, factual issues not
5 only as to the transfer from BONY to Chase but also from Chase
6 to LMG. It sounds like there are a few.

7 MR. MCCAFFREY: I have an assignment from Chase to
8 LMG. It's correct, there was a date that's incorrect but that
9 can be regarded as a scribner's error.

10 THE COURT: What about the name of the assignor?

11 MR. MCCAFFREY: The N.A.? I don't know that Ms.
12 Tirelli is correct. I think that there is an N.A., North
13 America. It's Chase North America, it's Chase Bank, North
14 America. They use it interchangeably and all over --

15 THE COURT: Well, it doesn't say "bank." I mean it
16 doesn't say bank. I guess that's the issue. I mean if you
17 look at the documents about sale of the retail business is with
18 JP Morgan Chase Bank, N.A. and the bank is not in there.

19 MR. MCCAFFREY: Well, again, then it's an error but
20 it doesn't --

21 MS. TIRELLI: Well, Your Honor, that requires
22 testimony.

23 MR. MCCAFFREY: But it doesn't pass the laugh test.
24 When is it incredulous to say what really happened to these
25 documents? When do we look at it and apply as the Court must

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1 just some reason and commonsense as I know Your Honor will.

2 We're going to get hung up on there was a K
3 missing, there was a B missing? You know, I respect the law
4 and we know we must follow things diligently and had I
5 overlooked those papers I would have made sure everything was
6 as particular as it needed to be but is that going to overcome
7 -- so the Deconne's get a windfall for \$800,000.00 --

8 THE COURT: What about the fact --

9 MR. MCCAFFREY: -- because someone made an error on
10 a piece of paper?

11 THE COURT: What about the fact that the date of
12 the assignment is after the date of the assignment from LMG to
13 Mr. Marx?

14 MR. MCCAFFREY: I don't have an explanation for it
15 but as Your Honor seemed to think a minute ago, it doesn't seem
16 inconceivable that -- I mean transfer of the --

17 THE COURT: No, what I said, "the inconceivable,"
18 that was the issue about the lost note and why --

19 MR. MCCAFFREY: Transfer of a note -- physically --
20 giving physical possession is transfer enough [sic].

21 THE COURT: No, no, but the assignment --

22 MR. MCCAFFREY: What specific --

23 THE COURT: -- LMG has an assignment agreement with
24 Mr. Marx that is not just a day earlier, it's a month earlier
25 or longer than the assignment from Chase to LMG which is odd.

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1 MR. MCCAFFREY: A party anticipating receiving a
2 document --

3 THE COURT: Well, how could you --

4 MR. MCCAFFREY: -- but then not getting it in time.

5 MS. TIRELLI: You can't assign what you do not
6 have.

7 THE COURT: But he made money on it. You know,
8 normally people don't sell something until they have it.

9 MS. TIRELLI: Your Honor, I think case law is
10 clear, you can't assign what you do not have.

11 THE COURT: Yes. So I think there are material
12 factual issues also on the next chain of title which is from
13 Chase to LMG.

14 I mean there wasn't a discovery cutoff so I don't
15 know if there's any issue as to Ms. Sullivan's bona fides. Of
16 course, if you introduce her to authenticate something I guess
17 you're certainly free to cross-examine on that but there's no
18 more discovery to be had on her but I think the cumulative
19 issues about the assignment, even though there is an assignment
20 here, there is a document that purports to transfer title, mean
21 that the assignment still has associated with it material
22 issues of fact as to whether in fact it was a valid assignment
23 by the then holder of the note -- owner of the note -- with the
24 right to enforce it to LMG and those are the name of the
25 assignor, date of the assignment, the fact that the assignment

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1 post-dates the subsequent assignment from LMG to Mr. Marx and
2 the date of the notes referred to in it, although, standing
3 alone it would probably infer that it was just a typo but all
4 of those combined, along with, I guess -- although this is more
5 background noise, I think -- the lost note issue I think raise
6 material factual issues as to the bona fides of the assignment
7 and when I say it's "background noise" I mean I think that you
8 can transfer a note and mortgage without having the actual note
9 so I think it's more just evidence of sloppiness on Chase's
10 part and poor recordkeeping and potentially them not getting
11 their title documents right.

12 MS. TIRELLI: Your Honor, if I may, just back to
13 the Chase transfer in paragraph 2.17 of my papers going to the
14 affidavit of lost note signed by Ms. Sullivan. She identifies
15 a lost note executed by the debtors to "Bank of New York and JP
16 Morgan Chase, N.A."

17 THE COURT: Right.

18 MS. TIRELLI: There is no such note as that so
19 that's another, you know, factual issue as to what exactly was
20 allegedly being transferred.

21 THE COURT: Well, it's an indication, again, of
22 sloppiness.

23 MS. TIRELLI: Well, we're saying "sloppiness," Your
24 Honor, but I'm actually questioning what Linear sold to Mr.
25 Marx and where Linear got it's papers. You know, I did request

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1 in discovery all communications between Marx and Linear, all
2 communications between Marx and Chase, all communications
3 between Marx and BONY, to see exactly who was talking to who
4 about what and when because it's very clear, based on the post-
5 proof of claim allonges that were produced in discovery but,
6 interestingly enough, not attached to any of the proofs of
7 claim are all dated by Linear so, clearly, it was a matter of
8 Mr. Marx going back to Linear to say, hey, I need more. You
9 know, I don't know how --

10 THE COURT: Which he has a right to do, I think.

11 MS. TIRELLI: Which he would have a right to do
12 but, you know, you can't have an allonge which, first of all,
13 is not attached. I mean, again --

14 THE COURT: But they're not relying on the allonge.
15 They're not relying on that for purposes of this motion.

16 MS. TIRELLI: Well, no, but I guess what I'm saying
17 is this goes back to credibility; you're making the papers that
18 don't do anything, that have no actual effect other than to
19 give them to me in discovery and expect me to rely on them.

20 THE COURT: Well, all right.

21 MS. TIRELLI: You know, someone is making up papers
22 here and I don't know who. You know, it's not easy to tell
23 from where I'm standing, you know, but very clearly, what
24 they've submitted is -- you know, it's just complete -- to me
25 are just nonsense.

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1 THE COURT: Well, I'll just repeat. I believe
2 there are enough -- Mr. Marx can call them "errors," you can
3 call them indicia of "unreliability" but there are enough of --
4 there's enough evidence of inaccuracies or errors in the
5 assignment-related documents to cast a doubt on the validity of
6 the assignment. That can be brought at trial one way or the
7 other.

8 MS. TIRELLI: Thank you, Your Honor.

9 THE COURT: Then, is there -- I mean I don't think
10 there's a dispute now that Mr. Marx, through his counsel, is in
11 possession of the original note and mortgage, leave aside the
12 allonge, just the original notes and mortgages.

13 MS. TIRELLI: Well, Your Honor, allonge aside,
14 another question of fact for the Court, there's an issue as to
15 when he would have acquired these "original" documents and --

16 THE COURT: But does it matter?

17 MS. TIRELLI: Well, he didn't have them at the time
18 he filed this proof of claim, Your Honor, I would say it does
19 matter. He didn't come into possession of them until after the
20 fact but the other issue I have, Your Honor, is at the bottom
21 of these agreements -- these credit line agreements -- some of
22 them that Mr. Marx is in possession of or certainly what Mr.
23 McCaffrey presented, I should say more accurately, some at the
24 bottom say "bank copies," some at the bottom say "borrower
25 copy" and it's as if they've been mixed together. So I don't

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1 know if they all came from the same agreement or not. It's as
2 if they're put together somehow.

3 THE COURT: But does it matter? If it's the actual
4 signature and it's the actual -- not a copy but the actual
5 note?

6 MS. TIRELLI: Well, Your Honor, my client wouldn't
7 have signed a mish-mosh of documents thrown together, they
8 would have signed one document. Where is that one document?
9 Why don't they have that?

10 This is not an original document, Your Honor, if
11 they're giving you a copy that was marked -- or some pages that
12 are copies, meaning "borrower's copy" versus "bank copy."

13 THE COURT: But if the borrower signs it, he signed
14 it. Whether it says "copy" or "lender copy" -- there may have
15 been a subsequent mix-up as to whether the borrower should have
16 had that copy in his possession as opposed to the bank but he
17 signed it.

18 MS. TIRELLI: Your Honor, but then it comes back to
19 what exactly --

20 MR. MCCAFFREY: And they're initialed at the
21 bottom.

22 MS. TIRELLI: -- is Mr. Marx holding? Is he
23 holding a copy or is he holding a wet ink original?

24 THE COURT: Well, that was my question. I mean I
25 think if there's an issue as to whether it's a xerox as opposed

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1 to, you know, a signed copy I understand that but if it's an
2 issue as to whether -- but I don't see an issue as to whether -
3 - if you acknowledge that it's actually signed as opposed to a
4 xerox, I don't think there's an issue as to whether it says
5 "bank copy" or "lender copy."

6 MS. TIRELLI: But it's mix of bank copy/lender copy
7 on pages.

8 THE COURT: But it's still signed.

9 MS. TIRELLI: But my client wouldn't have signed
10 that.

11 THE COURT: Is there any law that would say he
12 couldn't show that to a court and say, this is the original?

13 MS. TIRELLI: Well, when they asked did my client
14 sign that, very simply, I didn't sign that.

15 THE COURT: But I guess that's the ultimate issue -
16 -

17 MS. TIRELLI: I'm jumping ahead here.

18 THE COURT: -- how do we know -- but there's no
19 evidence that he -- where's the evidence that he didn't sign
20 it?

21 MS. TIRELLI: Well, he wouldn't -- you know, my
22 understanding, Your Honor, is that he would not have signed --
23 my client was a banker for 37 years -- is that he would not
24 have signed anything that was a mix of copy versus original.

25 THE COURT: But where does --

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1 MR. MCCAFFREY: Well, that's Ms. Tirelli's
2 testimony then --

3 MS. TIRELLI: You know, I don't know where that --

4 THE COURT: But where does it say --

5 MS. TIRELLI: I don't know where that came from.

6 THE COURT: He doesn't say that, does he? There's
7 nothing in the record to say that.

8 MR. MCCAFFREY: No.

9 MS. TIRELLI: Your Honor, that was only deposition
10 testimony. This is not --

11 THE COURT: No, but it's not --

12 MS. TIRELLI: He will have a chance to say that at
13 trial.

14 THE COURT: Again, step one, they have to present
15 prima facie evidence of their case. I have a basic question
16 which is is the note -- are the notes that they hold xeroxes or
17 signed? They say they have them. To me, I don't think you've
18 disputed that they're not xeroxes if they're signed; right?

19 MS. TIRELLI: What I said about [inaudible], Your
20 Honor, is that they have a mix. Okay. So maybe this is a
21 question of fact that --

22 THE COURT: A mix of what?

23 MS. TIRELLI: A mix of what are purported to be
24 copies and originals. The bank would have the original --

25 THE COURT: Well, but no, I don't want to use the

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1 word "copy" because copy can have two meanings.

2 MS. TIRELLI: Copies is -- correct; right.

3 THE COURT: Use the word "xerox." Are they xeroxes
4 or, i.e., are they photo images of a signature or are they the
5 signature?

6 MS. TIRELLI: Your Honor, I'm not here to testify
7 to that. I can't testify to that.

8 THE COURT: Well, is there a dispute as to that?

9 MS. TIRELLI: Well, there is a dispute as to the
10 whole document. If you're missing pages from the document --

11 THE COURT: No, but that's a separate issue. I'm
12 just trying to figure out -- because under the case law if they
13 have the original -- put it this way, if they're not a holder
14 under Article III but they have an assignment --

15 MR. MCCAFFREY: Non-holder in possession.

16 THE COURT: -- but they have an assignment so that
17 a transferee under the case law they could enforce the note and
18 mortgage if (1) their transferor was able to and (2) at the
19 time of enforcement they can show the court -- which I guess
20 would be me because we're talking about enforcing a proof of
21 claim -- that they have the original; the wet ink as opposed to
22 the xerox?

23 So I'm trying to figure out whether we have an
24 issue as to point two, which is whether they have the wet ink
25 as opposed to a xerox. It sounds like they don't. There's no

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1 issue there.

2 MS. TIRELLI: Well, Your Honor, I think that there
3 is an issue there because we have, again, a mix -- and I don't
4 want to use the word "copy," I don't even want to use the word
5 "xerox" because you get an image of something from a variety of
6 sources.

7 THE COURT: All right. But do you dispute -- they
8 say it's not an image, they say it's the signed version. So
9 what's the basis to say -- are you disputing it -- that you
10 say, no, it is an image?

11 MS. TIRELLI: Well, Your Honor, what I'm saying is
12 is that it seems to be a different version because --

13 THE COURT: No, but that's --

14 MS. TIRELLI: Your Honor, I can't it any
15 differently --

16 THE COURT: All right.

17 MS. TIRELLI: -- but I'm not going to concede that
18 they have a wet ink, full document original. If you have a
19 partial document you can't enforce and that's basic UCC. You
20 can't. So if they create a full copy by taking -- and I don't
21 know who would have done it, Your Honor.

22 THE COURT: All right. But that's a legal issue, I
23 think. The factual issue is whether they have signed
24 signatures as opposed to images and I think there's no legal
25 issue as to that; right? So we're not going to have that at

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1 trial. We're not going to have handwriting experts or paper
2 experts testify about whether it's signed.

3 You can try to persuade me, probably unless there
4 is a dispute about this, that because the notes that you're
5 referring to are compilations of, you know, bank copy versus
6 borrower copy, that that's somehow not enforceable but that
7 doesn't seem to be -- that's a different type of issue.

8 MS. TIRELLI: I suppose it depends then largely --
9 I wasn't prepared for this part today because I wasn't
10 anticipating this -- but I think it depends largely on which of
11 the pages were --

12 THE COURT: I guess or --

13 MS. TIRELLI: -- duplicative or wet ink.

14 THE COURT: -- if something is missing but, again,
15 I don't get a -- I mean in the --

16 MS. TIRELLI: I don't have memorized which page --

17 THE COURT: -- in the 7056 response I don't -- you
18 don't make this point do you?

19 MS. TIRELLI: I believe that I made it on the
20 additional facts in dispute -- my additional facts.

21 THE COURT: Okay.

22 MS. TIRELLI: I believe that I did.

23 THE COURT: That they hold a complete note?

24 MS. TIRELLI: I made the point that what they're
25 holding is an incomplete document that has been compiled

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1 together between different copies.

2 THE COURT: All right.

3 MS. TIRELLI: Again, I don't know by whom or when.

4 THE COURT: But it's not that -- you don't dispute
5 that they have each page, it's just that they may be from
6 different parties.

7 MS. TIRELLI: I'm going to have to go back and read
8 through the documents, Your Honor, so I would like just to
9 reserve on that but I think that there is an issue over the
10 condition of these documents.

11 THE COURT: All right. Well, I guess I have a very
12 hard time seeing how that could be the case if the only issue
13 is Page 8 is marked "borrower copy" and the rest is marked
14 "lender copy" but, to me, that's really a legal issue, not a
15 fact issue.

16 Okay. So except for that issue I don't think there
17 are any factual issues as to the notes and mortgages being in
18 Mr. Marx' possession.

19 Is there any issue with regard to LMG's assignment
20 to Mr. Marx? I didn't see one there either except the dating
21 point which we've already talked about -- the date of the
22 assignment.

23 MS. TIRELLI: Well, Your Honor --

24 THE COURT: Again, the point we've dealt with at
25 the very beginning which is, you know, fifty percent of fifty

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1 percent. We've already covered that but I'm just talking about
2 Mr. Marx at this point.

3 MS. TIRELLI: Well, with his final assignment I
4 think it's a matter of, you know, the point that I was making
5 is what did Linear have to assign --

6 THE COURT: Right.

7 MS. TIRELLI: -- and that's a significant issue.

8 THE COURT: But as far as the transfer between
9 Linear and Mr. Marx --

10 MS. TIRELLI: I think there's no doubt, Mr. Marx
11 paid a lot of money to Linear --

12 THE COURT: To Linear.

13 MS. TIRELLI: It's a matter of what did he get in
14 return.

15 THE COURT: Okay. All right.

16 I guess the chain of title between Chase and
17 Linear. Okay.

18 So I think, therefore, the motion for summary
19 judgment should be denied as to all of the issues except in
20 respect of -- all of the issues with respect to the chain of
21 title between in the first instance, Bank of New York and Chase
22 and in the second instance, as between Chase and LMG and then,
23 lastly, however, it would be granted as to the fact that Mr.
24 Marx is the current holder of an original of the notes and
25 mortgage subject two legal points which are, first, when he

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1 became that holder and how that relates to the timing of the
2 filing of the proof of claim and whether the proof of claim can
3 be amended; the same issue that we dealt with at the beginning
4 of this argument dealing with the fifty percent owned by
5 Liberty Trust and then the second issue is, again, I think the
6 legal issue which is whether there's an illegal certificate as
7 to the fact that the original notes owned or held by Mr. Marx
8 appear to be a compilation of a borrower copy and a lender
9 copy. I don't know if there's legal significance to that or
10 not but I don't think that's a factor.

11 MS. TIRELLI: Your Honor, then also just in regard
12 to the other issue that I brought out was whether or not this
13 first credit line agreement in 2004 is in fact a negotiable
14 instrument or not.

15 THE COURT: I don't think that matters, though,
16 does it? I mean he's not relying on --

17 MS. TIRELLI: Well, you're going into the title
18 either way.

19 THE COURT: He's not relying on being a holder
20 under the UCC, he's relying on being the transferee and as I
21 read the case law, although much of it has come up in the UCC
22 context, the general law applied to non-holders of negotiable
23 instruments under the UCC is taken right of general New York
24 law on transfer; what it takes to be a transferee and what is
25 required to enforce an instrument or it shows an action that's

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1 been transferred.

2 So I don't think the negotiable instrument -- I
3 think if he were relying on holder status it would be different
4 but he's not so I don't think whether it's a negotiable
5 instrument or not really matters.

6 MS. TIRELLI: The way I read Mr. McCaffrey's
7 papers, I thought they were relying solely on this being a
8 negotiable instrument under Article III which I'm saying it's
9 not and that's something that Your Honor may have to decide
10 later on; maybe it won't make a difference in the weight
11 because he has to prove chain of title. So either way.

12 THE COURT: Well, I mean what is your view on this?
13 Do you need it to be under --

14 MR. MCCAFFREY: No, I mean Your Honor is correct.

15 THE COURT: Is there anything -- whether it's a
16 negotiable instrument or not doesn't really matter does it for
17 your client?

18 MR. MCCAFFREY: Right. That I'm relying on being a
19 transferee, having the intent of the parties to transfer the
20 rights to enforce and being a non-holder-in-possession with the
21 right to enforce.

22 THE COURT: Right. Right. Which negotiability
23 doesn't really affect. I mean I think it's probably not a
24 negotiable instrument because it doesn't provide for a sum
25 certain, it's a line of credit, but I don't think it matters.

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1 MS. TIRELLI: Okay.

2 THE COURT: So I'll rule as I did.

3 You all can sit down. I'm just going to briefly
4 state why.

5 Mr. Marx has moved for summary judgment under
6 Bankruptcy Rule 7056 which incorporates Federal Rule of Civil
7 Procedure 56(a) in this adversary proceeding.

8 In the adversary proceeding the debtors/plaintiffs,
9 the DeConne's, have asserted fundamentally that Mr. Marx does
10 not have standing to enforce the asserted claims he has made
11 against them in the bankruptcy case based on the plaintiff's
12 assertions with respect to the underlying notes at issue.

13 Under Federal Rule of Civil Procedure 56(a), "The
14 court shall grant summary judgment if the movant shows that
15 there's no genuine dispute as to any material fact and it is
16 entitled to judgment as a matter of law subject to inapplicable
17 provisions of Rule 56. The party asserting that affect cannot
18 be or is generally disputed must support the assertion by
19 citing to particular parts of the record including depositions,
20 documents, electronically stored information, affidavits or
21 declarations, stipulations, admissions, interrogatory answers
22 or other materials or (b) by showing that the record does not
23 establish the absence or presence, as the case may be, of a
24 genuine dispute." Federal Rule of Civil Procedure 56(c)(1).

25 "The movant" -- that is Mr. Marx -- "bears the

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1 initial burden to satisfy each material element of its claim or
2 defense," Vermont Teddy Bear Company v. 1-800-Beargram Company,
3 373 F.3d, 241, 244, 2d. Cir., 2004, Isaac v. City of New York,
4 701 F. Supp. 2d, 477, 485, S.D.N.Y. 2010, aff'd., 271 Fed. App.
5 60, 2d. Cir. 2008. "Upon such a showing the non-moving party,"
6 that is the DeConne's, "must provide evidence of a genuine
7 issue of material fact to successfully oppose the motion,"
8 Montecedro Electric Industries Company v. Zenith Radio Corp.,
9 475 U.S. 574, 586, 1986, "Facts are material if they 'might
10 effect the outcome of the suit under the governing law.'" Anderson v. Liberty Lobbying, 472 U.S. 242, 248, 1986, "The
11 Court 'is not to weigh the evidence but is instead required to
12 view the evidence in the light most favorable to party opposing
13 summary judgment, to draw all reasonable inferences in favor of
14 that party and to eschew credibility assessments.'" Amnesty
15 America v. Town of West Hartford, 361 F.3d, 113, 133, 2d. Cir.,
16 2004.

17
18 "Summary judgment motion may not be defeated by
19 conclusory of self-serving statements by simply raising
20 metaphysical doubts about a material fact or by identifying
21 immaterial disputed facts." Anderson v. Liberty Lobby, 477
22 U.S. at 247 through 48, Matsushita Electric, 475 U.S. at 586,
23 "Although, 'if there is any evidence in the record from any
24 source from which a reasonable inference in the non-moving
25 party's favor may be drawn the moving parties simply cannot

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1 obtain a summary judgment.'" Binder & Binder, P.C. v.
2 Barnhardt, 481 F.3d, 141, 148, 2d. Cir., 2007. See, generally,
3 Matsushita Electric, 475 U.S. at 586.

4 As I noted, the fundamental issue in this adversary
5 proceeding a between the DeConne's and Mr. Marx is Mr. Marx'
6 standing to assert the proof of claim that he has filed in this
7 case on his behalf, that proof of claim is premised upon his
8 asserted interest in two notes; one dated 2004 and one dated
9 2006, which is secured by two mortgages on property owned by
10 the debtors in Yonkers.

11 There is no dispute between the parties that
12 debtors executed the two notes and mortgages or that the
13 mortgages have been recorded properly. The dispute is whether
14 Mr. Marx can assert his ownership of the notes and mortgages
15 and enforce them. The problem comes from the fact that the
16 mortgages and notes were issued to the Bank of New York and a
17 dispute between the DeConne's and Mr. Marx as to whether they
18 were validly transferred through a chain of title to Mr. Marx.

19 Mr. Marx acknowledges that the notes have not been
20 specifically endorsed to him and are not endorsed in blank. He
21 contends, instead, that he is the transferee of the notes and
22 as transferee-in-possession of the original notes he is
23 entitled to enforce the notes under applicable New York law.
24 Because he is not a holder of the notes, i.e., because the
25 notes have not been endorsed specifically to him or endorsed in

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1 blank, he is not entitled to the presumption of being a holder
2 and entitled to enforce the notes under the New York UCC, more
3 specifically, New York UCC Sections 3-202 and 3-203. This
4 leaves aside whether one of the notes, the 2004 line of credit
5 note, would be a negotiable instrument under the UCC in the
6 first instance but given that Mr. Marx is not relying upon
7 holder status under UCC Section 2303 but rather merely
8 transferee status under New York UCC 3-201 or applicable New
9 York common law. The issue of negotiability is not relevant to
10 this motion.

11 Mr. Marx is correct in his reading of the law that
12 he need not be the holder for purposes of New York UCC Section
13 3202 in order to be able to own and enforce the notes. His
14 contention that in fact he is able to own and enforce the notes
15 even though he's not a holder thereof, under the right
16 circumstances is aptly summarized by a well-reasoned opinion by
17 Justice Battaglia, Bank of New York v. Deane, 970, NYS 2d.,
18 427, Sup. Ct., 2013. As summarized by that case, "In sum in
19 the usual case, i.e., a case where there has not been fraud in
20 the transfer, a plaintiff has standing to prosecute a mortgage
21 foreclosure action where at the time the action is commenced
22 (1) the plaintiff is the holder of the note, see, New York UCC,
23 Section 1-20120, or (2) the plaintiff has possession of the
24 note by delivery, see, New York UCC Section 120114, from a
25 person entitled to enforce it for the purpose of giving the

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1 plaintiff the right to enforce it or (3) the plaintiff has been
2 assigned the note by a person entitled to enforce it for the
3 purpose of giving the plaintiff the right to collect the debt
4 evidenced by the note and the plaintiff tends the note that is
5 the original at the time of any judgment." That summary
6 appears at Page 437 of the Deane opinion.

7 The motion relies upon both the assertion that Mr.
8 Marx is in possession of the note and upon an assignment in
9 each case from the immediately prior contended holder, LMG,
10 that is Linear Mortgage Group, LLC which are attached as
11 Exhibit K to the motion and also attached to the amended proof
12 of claim in the case.

13 I should note -- and I haven't thus far -- that I
14 am applying New York law to this matter based upon the
15 governing law in the note which states any issue regarding
16 enforceability of the cooperative loan documents or documents
17 relating to real estate obligations shall be determined in
18 accordance with the laws of the state in which the related coop
19 premises or real estate obligations located and here the
20 property is located in New York state. New York state clearly
21 has the strongest interest in this dispute as well.

22 As stated at the beginning of oral argument, the
23 motion seeks summary judgment with respect to the entire proof
24 claim filed in this case by Mr. Marx premised upon the argument
25 that I just outlined. However, it is clear from Exhibit L that

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1 I've just referred to, as well as his counsel's confirmation
2 off the record, that in fact the assignment by LMG was really
3 two assignments; fifty percent to Mr. Marx and fifty percent to
4 a trust of which the beneficiary is stated to be Richard Marx'
5 IRA. So as I stated at the beginning of this argument, there is
6 an open issue as to the proof of claim's assertion for 100
7 percent of the amount owing under the note as opposed to only
8 fifty percent and whether the proof of claim can be amended.
9 So when I am addressing this motion I am only addressing the
10 fifty percent held clearly by -- asserted to be held clearly by
11 Mr. Marx.

12 There is no dispute that Mr. Marx is currently in
13 possession of original signatures on both notes and mortgages.
14 There is a dispute, however, as to when he obtained those
15 signatures given that there are statements on the record in
16 this case that at least at one time during the course of this
17 case it was believed he did not have such possession and,
18 further, there's a legal dispute as to whether the signatures
19 constitute originals, though on their face they would be
20 originals, i.e., not an image or a xerox, because it's asserted
21 that the notes in Mr. Marx' possession are compilations of
22 copies intended for the issuer and for the borrower but as far
23 as factual issues are concerned, I believe the only factual
24 issue as far as possession at this point is the timing of
25 possession which may or may not have legal significance.

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1 There are, however, material factual issues with
2 regard to another key element of the non-holder transferee
3 theory under which Mr. Marx is proceeding. That is that under
4 that theory, as aptly summarized by the Deane case and
5 longstanding New York law, a transferee without the presumption
6 of holder status that is conferred by UCC 3202 and 203 only has
7 the right of its transferor to enforce the note, see, id. at
8 437, therefore, if LMG lacked the power to enforce the note,
9 then Mr. Marx would lack the power to do so. See, also, Rhythm
10 and Hughes, Inc. v. Terminal Marketing Company, Inc., 2004,
11 U.S. District Lexis 7625 at Pgs. 28 through 30, S.D.N.Y., May
12 4, 2004, in which the court discusses generally the New York
13 law governing assignments and states, "It is elementary,
14 ancient law that an assignee never stands in any better
15 position than his assignor" at Page 30.

16 To prove it's prima facie case in its motion, the
17 movant refers to two sets of evidence that the original
18 transferee -- that is the transferee in the chain of title from
19 Bank of New York, i.e., JP Morgan Chase Bank, N.A., was a valid
20 transferee either as a holder or transferee-in-possession but
21 I've concluded that none of the evidence submitted by Mr. Marx
22 in fact sets forth on an admissible basis sufficient facts to
23 establish that proposition.

24 First, Mr. Marx relies upon both public filings and
25 press releases to the affect that Bank of New York and Chase

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1 merged, therefore, under the New York Business Corporation Law.
2 Chase stepped into the shoes of Bank of New York, the original
3 and undisputed holder of the note. The problem with this
4 assertion is that the documents submitted in support of that
5 proposition do not show a statutory merger or its equivalent
6 for purposes of the New York PCL but, instead, the acquisition
7 by Chase of certain business assets of Bank of New York which
8 continues to be a surviving entity as evidenced by, among other
9 things, the other evidence submitted in this case, an affidavit
10 by Ms. Schuele, who asserts that she is -- as of the date of
11 the affidavit -- an employee of Bank of New York.

12 The underlying transfer agreement that would show
13 the transfer of these notes and mortgages has not been
14 provided. Without that or any other admissible evidence
15 showing that in fact Bank of New York assigned these notes to
16 Chase, the movant has not carried its initial burden to
17 establish the elements upon which its motion -- or one of the
18 elements upon which the motion rests which is that there is an
19 enforceable chain of title through to Mr. Marx. A similar
20 point was made in the Deane case where at least there portions
21 of a pooling agreement purporting to show a transfer were
22 provided but the court declined to consider them sufficient
23 evidence of an assignment of the note, 970 NYS 2d. at 437. The
24 second purported evidentiary basis for Chase having received a
25 transfer of the note from the original issuer is an affidavit

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1 by Ms. Schuele, attached as Exhibit C to the motion. It is
2 clear to me that that affidavit would not be admissible under
3 any exception to the hearsay rule and does not establish that
4 JP Morgan Chase received the notes from Bank of New York. It
5 also appears to me to contradict the notion that they were
6 transferred by merger since it refers to a sale of the notes
7 but, more importantly, the affidavit does not set forth the
8 basis for Ms. Schuele's knowledge, whether she is a custodian
9 of Bank of New York or Chase documents and the other statements
10 as to whether the records were regularly maintained and
11 reliable required by the business records exception to the
12 hearsay rule or a basic foundation. See, In Re: Vinhnee, 336
13 BR 437, 444, 9th Cir., BAP 2005.

14 So there is a material factual issue even before
15 getting to the plaintiff's other evidence offered to suggest
16 that there was no transfer of the notes from Bank of New York
17 to Chase which would require the denial of the summary judgment
18 motion.

19 There is a second transfer after the purported
20 transfer from Bank of New York to Chase which is a transfer
21 from Chase to LMG. There, the movant has submitted sufficient
22 proof of its case to put the burden on the plaintiffs to submit
23 evidence of a material fact and that proof is the assignment to
24 Mr. Marx that I had previously referred to that's attached as
25 part of Exhibit L to the motion. However, as noted during oral

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1 argument, there were several issues brought out by the
2 plaintiffs with regard to that assignment from Chase to LMG.
3 First, it is not clear that the Chase entity purporting to
4 assign the notes and mortgages to Mr. Marx was the entity to
5 which if in fact they were transferred, they were transferred
6 to by Bank of New York. At least the press releases and public
7 filings regarding the sale of Bank of New York assets to Chase
8 has a somewhat different name for the Chase entity in it than
9 the Chase entity named in the assignment. Secondly, there are
10 two dating problems with the assignment; one is apparently
11 simply a typo which refers to notes from "3006" -- by a note
12 from 3006 as opposed to 2006 -- and perhaps, more importantly,
13 the fact that the date of the assignment is after the
14 assignment by the transferee LMG to Mr. Marx.

15 Given those issues and also what I'll refer to as a
16 "contextual background issue" raised by the fact that Chase
17 earlier in this case or Mr. Marx earlier in this case submitted
18 a lost note affidavit raise sufficient material factual issues
19 as to the Chase to LMG transfer also, too, require denial of
20 the motion.

21 So for those reasons I'll deny the motion and those
22 material factual issues will remain at issue and will need to
23 be the subject of a trial if this matter isn't settled.

24 So I'll ask Ms. Tirelli to submit an order
25 consistent with that ruling.

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1 You don't need to settle it on Mr. McCaffrey but
2 you should run it by him before you e-mail chambers. So I'll
3 look for that order.

4 As far as the next steps of this adversary
5 proceeding are concerned, discovery is complete so unless there
6 is some contention that a party did not actually comply with
7 the discovery order -- and I know you've made that, Ms. Tirelli
8 -- we should move promptly to trial on this issue.

9 As far as whether discovery actually has been
10 complied with or not, my practice before hearing a motion is
11 for the party to discuss the matter and then I'll have a
12 telephonic conference if you can't resolve the issue and only
13 if I need to we'll have a hearing on it requiring further
14 discovery or some other form of sanction.

15 So you all should talk about whether you believe
16 there's really a basis to have any additional discovery or on
17 based on only non-compliance with the discovery order, not
18 someone's simple wish that, you know, I wish I'd have asked for
19 more.

20 We might as well discuss this now. My practice
21 generally for trials is to take direct testimony of witnesses
22 under the party's control by a declaration or affidavit
23 submitted three days before the trial with the declarant to be
24 present for cross-examination at trial and redirect.
25 Obviously, if there's a third party witness that's not under

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1 your control that person can be here and testify on direct and
2 cross. You don't have to get an affidavit or a declaration
3 from him or her.

4 I also require the parties to meet and confer in
5 advance and agree on the admissibility of as many of the
6 proposed exhibits as possible so that they can have a joint
7 exhibit book and I discourage motions in limine unless the
8 exhibit really is going to drive the your whole presentation,
9 you know, affect your whole strategy and would rather just rule
10 on admissibility during the trial but if you're going to have
11 something that falls into that category you need to get a date
12 for a hearing on motion in limine before the trial.

13 I would think the trial here would be about a half
14 day, maybe it would carry on after lunch but not go beyond a
15 full day certainly. I think a lot of the issues have been
16 cleared away and from my ruling you know what issues remain.

17 So after you confer about the discovery issue or
18 issues and depending on how it's resolved, you should get a
19 trial date from Ms. Li, it's a non-Chapter 13 day.

20 You may also want to think about the timing issues
21 on amending the proof of claim. I would hate to just do a
22 trial here on just the fifty percent but that's only what's
23 really claimed at this point, I think, or properly claimed. So
24 you may want to think about amending the proof of claim and on
25 the other side, whether the amendment is permissible.

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1 You came in a little late, sir. I ruled -- before
2 we got into this summary judgment motion -- that the motions to
3 dismiss the third party claims are all granted. So I've asked
4 the respective movants to submit orders to that affect.

5 So that's where we are on this. I'll note -- as
6 I've noted in all of these types of document cases -- standing
7 cases, particularly where there's no dispute as to the
8 underlying mortgage, that there's still an underlying mortgage.
9 This is not an avoidance action under 544. The issue is just
10 standing.

11 So even if you win, Ms. Tirelli, you have that
12 mortgage out there. I don't know what they're going to do with
13 their house with it out there. So I think there's plenty of
14 room for both sides to try to resolve this matter consensually
15 and I'm happy to put the trial off, you know, if you're trying
16 to do that but I think you should get a holding date for a
17 trial from Ms. Li. Given my calendar, it would probably be in
18 August, maybe in late July, but you should check with her about
19 that.

20 MS. TIRELLI: Okay. Your Honor, I will. I will do
21 that right away.

22 THE COURT: Okay.

23 MR. MCCAFFREY: Yes, Your Honor.

24 THE COURT: Okay. But to me, in addition to the
25 standing issue the proof of claim issue is something you all

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1 need to look at. I don't know the answer to it. I can't give
2 you any guidance on it; whether at this point you'll be able to
3 amend the proof of claim or not to add in essence a new
4 claimant or how new it is. I can tell you -- and I have
5 opinions on this -- that one cannot file a late proof of claim
6 in a Chapter 13 case. So the amendment would have to relate
7 back under the case law. It may or may not relate back but to
8 me that affects the settlement issues as much as the merits on
9 the standing issue.

10 MS. TIRELLI: Your Honor, of course that would also
11 bring in then another party, potentially the trust or whoever
12 represents the trust.

13 THE COURT: Well, I guess that's true.

14 MS. TIRELLI: If we get that far but I mean that's
15 a whole other --

16 THE COURT: Yes. Although, I have to -- well, I
17 don't know. I mean if Mr. Marx' IRA is the sole beneficiary of
18 the trust that may not be that big of a deal.

19 Okay.

20 MR. MCCAFFREY: All right. Thank you, Your Honor.

21 MS. TIRELLI: Thank you, Your Honor.

22 THE COURT: Thank you.

23

24

25

1 CERTIFICATION

2 I, CARLA A. NUTTER, certify that the foregoing
3 transcript of proceedings is a true and accurate record of the
4 proceedings.

5 
6 _____

7
8 AMERICAN LEGAL TRANSCRIPTION

9 11 Market Street, Ste. 215
10 Poughkeepsie, New York 12601

11 Date: June 18, 2014
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